

## § 76.12

## 28 CFR Ch. I (7–1–11 Edition)

(3) The description of the procedures for the conduct of the hearing;

(4) A notice that the respondent party may waive the right to an oral hearing and request that the matter be determined on written motions and written submission of the evidence; and

(5) Such other matters as the Judge deems appropriate.

### § 76.12 Prehearing statements.

(a) At any time prior to the commencement of the hearing, the Judge may order any party to file a prehearing statement of position.

(b) A prehearing statement shall state the name of the party on whose behalf it is presented and shall briefly set forth the following matters, unless otherwise ordered by the Judge:

(1) Issues involved in the proceedings and whether the respondent requests an oral hearing;

(2) Facts stipulated;

(3) Facts in dispute;

(4) Witnesses, except to the extent that disclosure would be privileged, and exhibits by which disputed facts will be litigated;

(5) A brief statement of applicable law;

(6) The conclusions to be drawn;

(7) The estimated time required for presentation of the party's case; and

(8) Any appropriate comments, suggestions, or information which might assist the parties or the Judge in preparing for the hearing or otherwise aid in the disposition of the proceeding.

### § 76.13 Parties to the hearing.

The parties to the hearing shall be the United States of America and the respondent.

### § 76.14 Separation of functions.

An employee or an agent of the Department who is or was engaged in investigative or prosecutive functions for or on behalf of the United States in a case may not participate in the decision of that case.

### § 76.15 *Ex parte* communications.

(a) *Generally.* The Judge shall not consult with any party, attorney or person (except persons in the office of the Judge) on any legal or factual issue unless upon notice and opportunity for

all parties to participate. No party or attorney representing a party shall communicate in any instance with the Judge on any matter at issue in a case, unless notice and opportunity has been afforded for the other party to participate. This provision does not prohibit a party or attorney from inquiring about the status of a case or asking questions concerning administrative functions or procedures.

(b) *Sanctions.* A party or participant who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanctions. An attorney who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to sanctions, including, but not limited to, exclusion from the proceedings.

### § 76.16 Disqualification of a Judge.

(a) When a Judge deems himself or herself disqualified to preside in a particular proceeding, such Judge shall withdraw therefrom by notice on the record directed to the Chief Administrative Hearing Officer for the district in which the case is brought or, if there is no Chief Administrative Hearing Officer, to the Attorney General.

(b) Whenever any party shall deem the Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, that party shall file with the Judge a motion to recuse. The motion shall be supported by an affidavit setting forth the alleged grounds for disqualification. The Judge shall rule upon the motion.

(c) In the event of disqualification or recusal of a Judge as provided in paragraph (a) or (b) of this section, the Chief Administrative Hearing Officer or the Attorney General shall refer the matter to another Judge for further proceedings.

(d) If the Judge denies a motion to disqualify, the Attorney General may determine the matter only as part of the Attorney General's review of the initial decision on appeal, if any.